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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDDY FRAGA,

Defendant and Appellant.

B206492

(Los Angeles County
Superior Ct. No. TA090211)

APPEAL from a judgment of the Superior Court of Los Angeles County. William R. Chidsey, Jr., Judge. Affirmed in part, reversed in part.

Patrick Morgan Ford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Eddy Fraga appeals from the judgment entered following a jury trial in which he was convicted of driving under the influence of alcohol, driving with a blood alcohol level exceeding .08 percent, driving with a suspended license, and possession of less than an ounce of marijuana in a vehicle. Appellant contends the trial court violated his statutory and constitutional rights to counsel by dismissing the public defender's office, the evidence was insufficient to establish that his prior Vehicle Code section 23103¹ conviction was a qualifying prior conviction under section 23550, the trial court improperly sentenced him without obtaining a probation report, and the trial court imposed an unauthorized sentence for his marijuana conviction. We conclude resentencing is required because (1) the evidence regarding appellant's prior convictions was insufficient to place appellant's current section 23152 convictions within the scope of section 23550 and (2) the trial court imposed an unauthorized sentence for appellant's marijuana conviction. We also conclude the trial court erred by failing to obtain a probation report, but otherwise affirm.

FACTS

On the night of March 2, 2007,² appellant attempted to back his truck away from a sobriety checkpoint. In so doing, he almost collided with the vehicle behind him. A Los Angeles County Sheriff's Department patrol car blocked appellant's path and Deputy John Gibson walked up to appellant's truck. Gibson spoke to appellant through the driver's window and noticed that appellant stank of alcohol. Appellant also had bloodshot, watery eyes and slow, "thick" speech. Gibson administered various field

¹ Unless otherwise noted, all further statutory references pertain to the Vehicle Code.

sobriety tests and concluded appellant was under the influence of alcohol. Gibson searched appellant and found a small amount of marijuana in appellant's pocket. A breath test conducted about 47 minutes after appellant attempted to evade the checkpoint indicated appellant's blood alcohol level was .13 percent.

Appellant's driver's license had been revoked prior to March 2, and he had two prior driving under the influence convictions.

The jury convicted appellant of driving under the influence of alcohol (§ 23152, subd. (a)), driving with a blood alcohol level in excess of .08 percent (§ 23152, subd. (b)), driving with a suspended license (§ 14601.1, subd. (a)), and possession of less than one ounce of marijuana in a vehicle (§ 23222, subd. (b)). The jury also found appellant had suffered prior convictions of violating section 23152 on April 29, 1999 and April 12, 2001 and a prior conviction of violating section 23103 on June 12, 1998. The court sentenced appellant to two years in prison.

DISCUSSION

1. Right to counsel

Deputy Public Defender Hideo Nakano represented appellant at the preliminary hearing, which was conducted on June 14. On June 28, the prosecutor filed the original information and the case was called for arraignment. Appellant demanded counsel, and was represented by Deputy Public Defender Joseph Modder. The trial court granted Modder's request for a continuance "to run a financial evaluation on the defendant, as he may not qualify for [the public defender's] services." At the next hearing, on July 25, the court found appellant "does not qualify for the services of the public defender."³ The minute order for the August 10 pretrial hearing indicates that appellant requested pro per

² Unless otherwise noted, all further date references pertain to 2007.

status, and the court advised him to retain counsel. Appellant nonetheless continued to represent himself. He appeared at an additional six pre-trial hearings and made Penal Code section 995 and 1538.5 motions.

On February 1, 2008, both parties announced they were ready for trial. After seeking a ruling upon and arguing his suppression motion, appellant stated, “Also, your honor, I would like to point out the only reason I’m representing myself is because I’m not allowed to have any form of counsel.” The court asked for an explanation, and appellant replied, “I’ve asked the court more than twice to be given proper representation, and they have denied it.” The court asked, “Did the public defender make a determination that, based upon your financial circumstances, you’re not entitled to their services?” Appellant replied, “Yes, but it’s the wrong assumption. I have no possessions. I have not made any money. I have my income taxes for last year to prove that I have not made any money all last year. I have no ability to pay for any attorney.” Appellant further explained that he had been “in the mortgage field,” but was “unemployed right now” and did not own a home. He later explained that he had spent all of his money on his bail.

The court reviewed the minute orders, noted there was no indication that appellant requested counsel after the public defender was relieved, and explained to appellant that he did not have a right to counsel at the public’s expense unless he was indigent. The court called Nakano to the courtroom to “shed some light on [appellant’s] case.” Nakano informed the court that he only represented appellant at the preliminary hearing. He explained that the public defender’s office makes little or no inquiry into a defendant’s financial status until after the preliminary hearing. Once a defendant is held to answer, “they’re given to an assigned deputy. The deputy then goes through much more deeply into both the case and our representation. [¶] It’s my understanding that they did that in

³ The appellate record does not include a reporter’s transcript for any proceedings in 2007 other than the preliminary hearing.

this case, and it was determined by whoever did that, that he was ineligible.” Nakano suggested that changed circumstances might alter his office’s stance, but the court noted the case had been called for trial and “the record is devoid of any request, based upon a change of circumstances for reappointment of counsel” The court further noted that appellant had made no showing that he was indigent.

Appellant continued to represent himself throughout the proceedings.

Appellant contends the trial court violated his statutory and constitutional rights to be represented by counsel by dismissing and refusing to reappoint the public defender’s office.

A criminal defendant who is not indigent has no constitutional right to appointed counsel. (*In re Ricky H.* (1970) 2 Cal.3d 513, 523.) As far as the record reveals, appellant was not indigent and therefore had no constitutional right to appointed counsel. The trial court found at the July 25 hearing that appellant did not qualify for the services of the public defender, which was necessarily based upon a finding that he was not indigent. Although appellant apparently disagrees with this assessment of his financial status, the appellate record contains nothing to demonstrate that the finding was erroneous.

The trial court’s determination was also consistent with Government Code section 27707, which provides, in pertinent part, “The court in which the proceeding is pending may make the final determination in each case as to whether a defendant or person described in Section 27706 is financially able to employ counsel and qualifies for the services of the public defender. The public defender shall, however, render legal services as provided in subdivisions (a), (b) and (c) of Section 27706 for any person the public defender determines is not financially able to employ counsel until such time as a contrary determination is made by the court. If a contrary determination is made, the public defender thereafter may not render services for such person except in a proceeding to review the determination of that issue or in an unrelated proceeding.” The court in this case made its final determination, based upon the evaluation conducted by the public

defender's office, that appellant was able to employ counsel and therefore did not qualify for representation by the public defender.

Citing *Roswall v. Municipal Court* (1979) 89 Cal.App.3d 467 (*Roswall*), appellant argues the trial court lacked authority to "reevaluate" his eligibility after "the public defender's office had been appointed and an attorney-client relationship had been established."

In *Roswall*, the public defender's office conducted a financial evaluation and found the defendants were indigent and eligible for appointed counsel. The court appointed the public defender's office to represent each defendant, but at a subsequent hearing, the court unilaterally concluded the defendants were ineligible for appointed counsel. Neither the defendants nor the public defender's office consented to the termination of the public defender's appointment. (*Roswall, supra*, 89 Cal.App.3d at p. 470.) The appellate court held that this was error:

"We therefore conclude that once the court has made its determination that a defendant is financially eligible for legal assistance at public expense and has appointed counsel to represent him, it may not thereafter, without the defendant's consent, remove that attorney on grounds of financial ineligibility. We do not in any way imply that the court may not review the public defender's decision to represent the defendant as the result of that office's investigation. However, section 27707 and the Supreme Court's pronouncements in *Ingram [v. Justice Court]* (1968) 69 Cal.2d 832] impel the conclusion that if the trial court wishes to review a defendant's eligibility for public legal services, it must do so at the earliest opportunity, in almost all instances before or during the first court appearance of counsel. (See *Ingram, supra*, 69 Cal.2d at p. 840.) Once the court has permitted the defendant to proceed with representation by the public defender or has formally appointed counsel, it must thereafter "keep hands off and permit counsel to control the case within the embrace of his right to do so." (*Id.*, quoting from *People v. Ferry* (1965) 237 Cal.App.2d 880, 890 [47 Cal.Rptr. 324].) At that

point the court's sole remedy for enforcing a financially able defendant's burden of paying the cost of counsel will be a hearing into the matter at the conclusion of the criminal proceedings, as provided for in Penal Code section 987.8."

(*Roswall*, *supra*, 89 Cal.App.3d at p. 475.)

Appellant's case differs from *Roswall*, however, in that the public defender's office determined appellant was financially ineligible for its services. Furthermore, although the public defender's office represented appellant in the preliminary hearing, nothing in the record indicates the court appointed the public defender to represent appellant at the preliminary hearing. After the Information was filed, the trial court neither appointed the public defender to represent appellant nor found appellant eligible for appointed counsel. Indeed, unlike the sequence of events in *Roswall*, the trial court here never changed its position regarding appellant's financial eligibility. Accordingly, the express conditions required to apply the principle announced in *Roswall* did not arise here: the court had not "made its determination that a defendant [was] financially eligible for legal assistance at public expense and . . . appointed counsel to represent him." The interim representation of appellant by the public defender's office at the preliminary hearing was pursuant to the provisions of Government Code section 27706, not pursuant to a final determination by the trial court that appellant was eligible for appointed counsel. Moreover, as the *Roswall* court cautioned, the trial court's decision that appellant was ineligible for counsel was made at appellant's arraignment, which was "the earliest opportunity" after the public defender's office evaluated appellant financially.

For all of these reasons, appellant's contention has no merit.

2. Sufficiency of evidence re prior conviction

Section 23550 provides that a violation of section 23152 may be treated as a felony if the defendant has been convicted of "three or more separate violations of Section 23103, as specified in Section 23103.5, or Section 23152 or 23153, or any combination thereof" within 10 years of the current offense.

Appellant was convicted in counts 1 and 2 of violating section 23152. The prosecutor's paralegal testified that appellant had two prior section 23152 convictions, dated April 29, 1999 and April 12, 2001. She further testified appellant was convicted on June 12, 1998 of violating section 23103.

Appellant contends, and respondent concedes, that the evidence was insufficient to establish that appellant's 1998 conviction under section 23103 arose from the circumstances described in section 23103.5, i.e., a negotiated plea to a violation of section 23103 where the defendant was charged with violating section 23152. Accordingly, the prosecution failed to prove that appellant had three prior convictions that qualified him for felony treatment under section 23550. Appellant's convictions in counts 1 and 2 are misdemeanors, and he must be resentenced.

3. Failure to obtain probation report

Appellant contends, and respondent concedes, that the trial court improperly failed to obtain a probation report before sentencing appellant, in violation of Penal Code section 1203. Because appellant's section 23152 convictions should not have been treated as a felony and the remaining offenses were misdemeanors, no probation report will be required prior to resentencing, although the court may elect to obtain one. (Pen. Code, § 1203, subds. (b)(1), (d).)

4. Unauthorized sentence

The trial court sentenced appellant to a concurrent term of six months in jail for possession of less than one ounce of marijuana in a vehicle. (§ 23222, subd. (b).)

Appellant contends, and respondent concedes, that this was an unauthorized sentence. The sole penalty provided by section 23222, subdivision (b), is a fine of not more than \$100. Upon remand for resentencing, the trial court must correct the sentence for count 4 to conform to the statute.

DISPOSITION

The sentence is vacated and the case is remanded for resentencing on counts 1, 2, and 4. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TUCKER, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

*Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.